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Amnesty Now! Ending Prison Overcrowding through a Categorical Use of the Pardon Power

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ARTICLES

Amnesty Now! Ending Prison Overcrowding through a Categorical Use of the Pardon Power

JONATHAN SIMON^{*}

America's practice of mass incarceration is coming under growing criticism as fiscally unsustainable and morally indefensible. Chronic overcrowding of prisons, a problem that epitomizes the destructive and unlawful core of mass incarceration, now afflicts the federal prison system and nearly half the states. Actual reforms, however, like President Obama's recent grant of clemency to forty-six federal prisoners serving long drug sentences for non-violent conduct, or recent one-off sentencing reforms aimed at preventing imprisonment for minor drug or property crimes, are manifestly insufficient to end mass incarceration, or even the chronic overcrowding that represents its most degrading and destructive aspect. The problem with both kinds of measures is that they retain two core presumptions that built mass incarceration in the first place. First, the "presumption of dangerousness" that exists against those currently or formerly caught up in the criminal justice system, no matter how minor their interaction. Second, the "presumption of confidence" in prosecutorial discretion to manage the huge portion of the population subjected to such suspicions. Both of these presumptions operate to narrow channels of relief for individual prisoners and reform for the system overall.

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To overcome both of these presumptions, this essay proposes a simple extension of the clemency model. The pardoning power under which President Obama granted his recent clemencies, which is possessed by the vast majority of governors with respect to state prisoners, permits the granting of relief (from partial remission of sentence to the complete redaction of the conviction) not only to individuals, but also to whole categories of prisoners. Pardon in this form, known generally as amnesty, has a limited history in the United States, but has been commonly used by European countries precisely to relieve problems like prison overcrowding. President Obama has begun to use this kind of approach to address the related problem of immigration and mass deportation in the United States through his policy, announced in May 2014, that his administration would favor the granting of “deferred action” with respect to whole categories of non-citizens inside the United States and subject to deportation.

While deferred action is not a perfect analogy for pardon (for one thing, it is not necessarily permanent), and while other aspects of the administration’s action epitomize the very presumptions that are blocking reform in the criminal justice field (particularly the blanket exclusion of so-called “criminal aliens”), deferred action paves the way for the kind of action that is necessary to overcome the toxic situation of prison overcrowding in the United States, as well as the larger system of mass incarceration. Amnesty measures are deeply problematic in advanced legal systems like in the United States and for good reason. However, limited application of such measures takes inspiration from the long religious tradition of “jubilee,” and from the existing limited tradition of federal amnesties for those who have violated military service-related laws during major wars. As these traditions suggest, when properly used, amnesties can both relieve immediate problems and improve the legitimacy of legal systems distended by extreme conditions.

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INTRODUCTION: CAN'T GET THERE FROM HERE

Across nearly four decades, from the early-1970s until the mid-2000s, the scale of incarcerations in the United States has fundamentally shifted from a low of around 161 prisoners per 100 thousand free people in the community in 1972, to 707 prisoners per 100 thousand in 2012, or a total of 2.23 million people.¹ To achieve this increase, prosecutors used their broad discretion under existing laws to seek imprisonment,² and lawmakers increased the severity of prison sentences for virtually all crimes through restating base levels and enacting a wide assortment of enhancements.³ A recent consensus emerged that America has too many prisoners and should reduce its reliance on incarceration, particularly in response to low-level felonies involving drugs and property.⁴ Mass incarceration is now blamed for concentrating punishment on already socially and economically marginalized minority communities,⁵ creating inhumane conditions on an industrial scale,⁶ and producing only modest reductions in crime at unacceptably high costs.⁷ But while a growing bipartisan coalition, unimaginable just a few years ago, is trumpeting the need to end mass incarceration,⁸ there is little evidence thus far

¹ COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 13 (Jeremy Travis, et. al. eds. 2014) [hereinafter *CAUSES AND CONSEQUENCES*].

² Franklin E. Zimring, *The Scale of Imprisonment in the United States: 20th Century Patterns and 21st Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1232 (2010).

³ *CAUSES AND CONSEQUENCES*, *supra* note 1, at 3–4.

⁴ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 8 (2014) (providing a summary of how mass incarceration came to be viewed as a problem and limited consensus to reduce the prison population).

⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010).

⁶ JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* 2–5 (2014).

⁷ FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 51–52 (2007).

⁸ HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 6–8 (2015).

that the political logics behind mass incarceration have been diminished enough to achieve this goal.⁹ One at a time, reforms in state and federal sentencing laws and increased use of executive powers to increase clemency and parole simply cannot overcome the interlocking structural power of a hyper-punitive system of sentencing laws and a powerful complex of law enforcement establishments that dominate both state and federal justice.¹⁰ Like the ambition to achieve interplanetary travel, the goal of eliminating mass incarceration in our time simply cannot be attained by conventional political and legal technologies.

The laws and practices that sustain extraordinary incarceration levels in the face of chronic overcrowding, high costs, and little evidence that they are necessary to keep crime low, depend not only on politics, but also on powerful presumptions that have become a “common sense” about crime, crime prevention, and prisons, ever since crime initially spiked in the 1960s and 1970s.¹¹ The first one might be called the “presumption of dangerousness,” or the idea that anybody arrested on a criminal charge, no matter how minor, might turn out to be a really dangerous person; if a person is convicted of a crime, no matter how minor, that potentiality has become a likelihood.¹² The “presumption of dangerousness” means that while long, incapacitating prison terms may not be deemed necessary to protect the public against *all* the people convicted of minor felonies, it is necessary for *some*, and so a policy that favors public safety over the rights of people convicted of crime will err well on the side of caution.¹³

The second presumption comes in here. Since even those states with the most willingness to build prisons and jails do not have the capacity to incapacitate all of the people convicted of minor crimes, some level of selection must be made, and the actor or institution

⁹ GOTTSCHALK, *supra* note 4, at 16.

¹⁰ The late Bill Stuntz provided a compelling analysis of this complex. BILL STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5–7 (2011). On the constraints on clemency, see Rachel Barkow, *Clemency and the Unitary Executive* 16–20 (N.Y.U. Pub. Law. & Legal Theory Research Paper Series, Working Paper No. 14-38, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484586.

¹¹ SIMON, *supra* note 6, at 3–4 (describing this “common sense” and its historical origins).

¹² *Id.* at 4.

¹³ *Id.*

most trusted to make that selection is the prosecutor.¹⁴ This presumption is not hard to appreciate, although in its super strong form it does not predate the recent war on crime.¹⁵ Most prosecutor's offices are run by local District or State Attorneys who must answer to the voters in the competitive local elections every four years or so.¹⁶ For citizens anxious that powerful bureaucracies might be insensitive to their vulnerabilities, there is clear appeal to a model of giving prosecutors power to incapacitate the right felons, and then punishing them at the ballot box if they fail to do so.¹⁷ Prosecutors are also deemed "experts" in crime by a public that does not trust judges or parole boards with the same discretion.¹⁸ The structural failures of this model, especially in its tendency to reflect the preferences of suburban white middle class voters, who face relatively little crime risk, over inner city lower class voters of color, who face relatively large crime risks, are well established at this point.¹⁹ For our purposes, however, it is the power of elected state prosecutors, built up over the decades by intense legislative competition to appear tougher on crime, that compels skepticism about the ability of the major reform pathways to clear the backlog of over-punishment and place the nation on a sustainable path of reducing incarceration.²⁰ Prosecutors, as an organized interest group, have politically opposed sentencing reforms in most states and have insisted on a

¹⁴ Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1351–52 (2008).

¹⁵ JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 7–8 (2007) (describing the rise of the prosecutor as the most trusted political office); see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 450–53 (2001).

¹⁶ Barkow, *supra* note 14, at 1353.

¹⁷ *Id.*

¹⁸ *Id.* at 1354.

¹⁹ See, e.g., ALEXANDER, *supra* note 5, at 13; STUNTZ, *supra* note 10, at 2; Davis, *supra* note 15, at 443, 448; Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C.L. REV. 1243, 1268–69 (2011); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 154–55 (2008). This is less of a problem where county and city voting lines are the same or where cities have their own prosecuting attorney.

²⁰ SIMON, *supra* note 15, at 33–34.

cautious approach to efforts like President Obama's clemency program.²¹

Together, these interlocking presumptions make it very difficult to fully open the channels of reform. Prosecutors oppose reforms by invoking both the presumption of dangerousness and the presumption of confidence in their discretion. And even when they lose politically, they can use that discretion to charge around established reforms.²² What is needed is a radical measure to force open the conventional channels of change, and upend the penal ideology that assigns an unknowable (and thus inherently frightening) degree of dangerousness to people who commit even minor felonies (especially if they belong to categories already perceived as high risk) and grants to the prosecution a presumption of suitability to exercise discretion.

This article examines amnesty, by which I mean measures of collective reprieve of criminal penalties that aim to reduce the scale of incarceration or restore formerly incarcerated citizens to full civil rights and equal citizenship.²³ Amnesty, while rare in the United States, is an internationally respected tool for addressing periods of excessive punitiveness and harshness driven by the exigencies of war.²⁴ Mass incarceration represents just such a period of excess, and our forty-year-long war on crime and drugs is a real war, one that has profoundly shaped law and practice.

Most states and the federal government could eliminate toxic prison overcrowding in a matter of months through an amnesty based on the pardon power of the chief executive.²⁵ In the minority

²¹ Vivian Ho, *Prop 47: Deep split over law reducing 6 felonies to misdemeanors*, SAN FRANCISCO CHRONICLE (Nov. 5, 2015, 7:34 PM), <http://www.sfgate.com/crime/article/S-F-district-attorney-defends-Prop-47-which-6614091.php>; Matt Ford, *The Limits of Obama's Clemency*, THE ATLANTIC (Dec. 18, 2014), <http://www.theatlantic.com/politics/archive/2014/12/the-limits-of-obama-mercy/383870/>.

²² This may already be happening with respect to Proposition 47 in California.

²³ Kent Greenawalt, *Vietnam Amnesty—Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1, 3 (1976).

²⁴ See *infra* Part II.C.

²⁵ Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL'Y 1, 5–7 (2013).

of states that do not vest such power in the hands of the chief executive, it might take legislation authorizing or mandating such an amnesty. These amnesties would immediately undo the ongoing harm to prisoners and to the legitimacy of the penal system that is caused by overcrowding.²⁶ More importantly, by shattering the carceral consensus created by the presumption of dangerousness and the presumption of confidence in prosecutorial discretion, amnesties would dramatically challenge the beliefs that have shaped and preserved mass incarceration.

Of course, amnesties also pose substantial dangers. In the short term, they could lead to crime waves, as underprepared state and local parole and probation agencies struggle to help thousands of prisoners cope with reentry.²⁷ In the long term, they could undermine deterrence and the legitimacy of law more generally as citizens consider the possibility of future amnesties on their criminal and law-abiding behavior.²⁸ A review of the history of amnesty, as well as a growing body of empirical research on Italy's 2006 General Pardon, which resulted in more than 40 thousand prisoners being released over several months in an effort to relieve severe prison overcrowding, suggest that these risks can be managed.²⁹

Part I will address the temptation of more realistic paths toward reducing incarceration. If these paths of "ordinary" legal reform were as open as they have been historically, they would be sufficient. Instead, they have been dramatically narrowed by the interlocking presumptions. These paths must be pursued but they also must be supplemented by efforts to use extraordinary solutions. Part II explores one far-from-ordinary path of reform, in the U.S. context (as we shall see, it has been more common elsewhere), namely general pardons or amnesties. This practice has its origins in the theological temporality of the Torah, but was incorporated through the

²⁶ Zach Hindin, *A More Historic Act of Clemency*, THE ATLANTIC (July 14, 2015), <http://www.theatlantic.com/politics/archive/2015/07/a-more-historic-act-of-clemency/398468/>.

²⁷ See, e.g., Peter Popham, *Mass Pardon for Convicts in Italy Leads to a Crime Wave*, THE INDEPENDENT (Aug. 06 2006), <http://independent.co.uk/news/world/europe/mass-pardon-for-convicts-in-italy-leads-to-a-crime-wave-410755.html>.

²⁸ *Id.*

²⁹ See *infra* Part II.C.2.

Church into the practice of many European Christian Kingdoms and into the pardoning powers of secular nation states that sprang from them. Part III offers an overview of how amnesties, which could be legislative as well as done by executive decree alone, could play an important role in both eliminating the immediate scourge of overcrowding in our federal prisons and many state prison systems and in helping to loosen the hold of the twin presumptions on conventional means of legal reforms.

I. NARROW CHANNELS OF “ORDINARY” LEGAL REFORMS

While extraordinary in result, there was nothing extraordinary or illegal about the way mass incarceration was created. It was produced through the procedurally correct production of harsh new laws and the legally authorized exercise of a growing armory of prosecutorial discretion. These same channels could, in principle, be used to restrain our now admittedly excessive use, and must in the end be reformed if a permanent reduction in the scale of imprisonment is to be achieved. At present, however, the very extremity and power of the punitive complex we have constructed is actively narrowing the capacity of these channels to allow change.³⁰

Despite crime rates that have largely remained at the low levels attained at the turn of the century and a growing tide of political support for ending mass incarceration, the national imprisonment rate and total number of prisoners in 2013 remained stubbornly close to its high in 2009.³¹ While there appears to be support for further reducing the imprisonment rate, there is no consensus about how far it should go.³² Already, shifts in prison sentencing patterns over the past decade have seen significant reduction in prisoners serving sentences primarily based on a drug crime, and more than half of the current state prisoners are serving sentences for crimes considered

³⁰ GOTTSCHALK, *supra* note 4, at 2.

³¹ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 1 (2014) (At the end of 2013, the national prisoner population was up over 4,000 prisoners from 2012, but at 1,574,700 remained below the peak of 1,615,500 prisoners in 2009.)

³² See, e.g., GOTTSCHALK, *supra* note 4.

violent offenses.³³ Some leaders have called for a fifty percent reduction in the national prison population, but this would still leave the United States with twice its historic incarceration rate and the highest in the wealthy democratic world.³⁴ Even achieving that goal, however, would require steep reductions in the current length of sentences for violent and serious property offenses,³⁵ reductions for which there are, thus far, little evidence of public support or political leadership.

A. Court-Ordered Population Reductions

Most of the decline in the United States prison population since 2009 has come from reductions in a few states, particularly California, where in *Brown v. Plata*³⁶ the Supreme Court upheld a massive federal court order population cap that forced the State to adopt laws diverting those convicted of most non-violent, non-sexual, non-serious felony offenses to non-prison sentences—a process that has largely run its course.³⁷ In fact, states as a whole added prisoners in 2013, and the national decline that year was solely due to federal reductions.³⁸ While *Plata* is a landmark ruling that suggests courts will no longer tolerate the toxic combination of overcrowding and chronic illness that is a structural feature of mass incarceration, the

³³ *Id.* at 15–16 (54% of state prisoners were serving sentences for violent offenses, but more than half of federal prisoners are serving drug sentences).

³⁴ Former White House adviser and anti-incarceration activist Van Jones has called for a fifty percent reduction. Dana Goldstein, *How to Cut the Prison Population by Fifty Percent*, THE MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent>.

³⁵ John Pfaff, Opinion, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (July 26, 2015), https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html.

³⁶ 131 S. Ct. 1910 (2011).

³⁷ CARSON, *supra* note 31, at 12.

³⁸ *Id.* at 13. Those diversion laws, known collectively as “correctional realignment,” had completed their population reduction with no further reductions expected due to those legal changes by the end of calendar year 2012. While law suits concerning overcrowding are pending throughout the nation and present an important pressure point for ending mass incarceration, the California experience suggests that years of litigation may have to take place before court orders remotely similar to *Plata* are likely.

nearly twenty years it took to produce a population cap, and the extraordinary record produced in the case, suggests we need other devices in play to dislodge mass incarceration in our lifetimes.³⁹

B. Sentencing Reform

For decades, sentencing reform has been the goal of those seeking to end mass incarceration.⁴⁰ In the strongest form of sentencing reform, states would agree on the size of the maximum prison populations they wished to incarcerate, use statistical analysis of past sentencing patterns to predict the composition of future prison populations, and reset sentences to achieve the new aggregate target. A commission could be charged with adjusting sentences as more data comes in to assure that the population remains in control. Thus far, however, progress toward sentencing reform has been modest and limited to specific legal reforms aimed at particularly indefensible and controversial examples of harsh and racially disproportionate justice, including New York's Rockefeller-era drug trafficking sentencing laws;⁴¹ California's notoriously harsh and capricious "Three Strikes" felony sentence enhancement law;⁴² and Congress' outrageously racially disproportionate minimum mandatory sentence for possessing more than 5 grams of "crack" cocaine (largely sold by and marketed to African Americans), or 500 grams of "powder" cocaine (largely sold and marketed by whites).⁴³ These one-off sentencing reforms, even when made retroactive, have only had a modest effect on the overall prison population. More ominously, given the massive armory of charging options state and federal prosecutors

³⁹ SIMON, *supra* note 6, at 9–10.

⁴⁰ See, e.g., Aviram, *supra* note 8, at 111.

⁴¹ Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES (Mar. 25, 2009), <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>.

⁴² Since Three-Strikes was an amendment to the California Constitution by voter initiative, reforms have come through successful voter initiatives: Proposition 36 in 2010 and Proposition 47 in 2014. See, e.g., Paige St. John, *Prop. 47 Passes, Reducing Some Crime Penalties*, L.A. TIMES (Nov. 4, 2014, 9:01 PM), <http://www.latimes.com/local/political/la-me-ff-prop-47-drug-possession-20141103-story.html>.

⁴³ Editorial Board, *Sentencing Reform Starts to Pay Off*, N.Y. TIMES (Aug. 1, 2013), <http://www.nytimes.com/2013/08/02/opinion/sentencing-reform-starts-to-pay-off.html>.

now have available, there is nothing to prevent prosecutors' intent on achieving long prison sentences from charging around these reforms. Although there is much discussion of broader sentencing reform at the federal level and from some governors, no significant piece of legislation has been put forward. Even the discussions suggest that broader reforms are limited to drug and some low-level property crimes.⁴⁴

C. *Individualized Clemency, Parole, and Good Time Credits*

Executive and administrative actions, other than amnesty, also present a possible path toward reducing incarceration.⁴⁵ In recent decades, presidents and governors have been famously reluctant to exercise their clemency or pardon powers, and rarely, if ever, have they used these tools to remove from prison those who are there under legal and factually unchallenged convictions.⁴⁶ The effort announced by President Obama and Attorney General Holder last year to use the clemency power to address the plight of federal prisoners serving long terms for non-violent drug offenses has just produced its first results—a batch of 46 prisoners, all of whom had served ten years or more, and most of whom faced life sentences.⁴⁷ As was much reported, this was by far more than any President since Lyndon B. Johnson.⁴⁸ The problem is that there are tens of thousands of federal prisoners in prison for non-violent drug crimes.⁴⁹

⁴⁴ Francine Kiefer, *Prison Sentencing Reform: Bipartisan Efforts Make Headway in Congress*, CHRISTIAN SCI. MONITOR (July 16, 2015), <http://www.csmonitor.com/USA/Politics/2015/0716/Prison-sentencing-reform-Bipartisan-efforts-make-headway-in-Congress-video>.

⁴⁵ Larkin, *supra* note 25, at 2.

⁴⁶ *Id.* at 3; Barkow, *supra* note 14, at 1333.

⁴⁷ Hindin, *supra* note 26.

⁴⁸ *Id.*

⁴⁹ Hindin notes that there are nearly 100,000 prisoners serving drug sentences in federal prisons. *Id.* Presumably a smaller number meet President Obama's criteria of "non-violent." A figure of 30 thousand was used in the New York Times editorial the day following President Obama's visit to a federal prison in Oklahoma to meet with some prisoners there for non-violent drug crimes. See Editorial Board, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html>.

Few, if any, governors have used clemency to reduce prison populations in their states.⁵⁰

Parole is an administrative process that allows a board of experts, usually appointed by the governor, to consider early release for inmates on an individualized basis, generally on a finding that they have been rehabilitated.⁵¹ Parole fell out of favor with politicians and the public during the rise of mass incarceration and remains a general release mechanism for prisoners in only sixteen states.⁵²

Paul L. Larkin, Jr., has pointed to an expansion of “good time credits” for prisoners as a politically viable way to reduce prison overcrowding.⁵³ Good time credits are another administrative measure, generally reducing a prisoner’s sentence by a legislated ratio of days off for a certain number of days of “good behavior.”⁵⁴ As with parole, the mechanism must first be set up by the legislature, and any expansion in good time credits must also be approved by the legislature.⁵⁵ Once in place, it is at the discretion of the warden to award the credits based on reports filed by prison staff on the inmates’ behavior.⁵⁶

A significant increase in good time credits could help reduce prison overcrowding and may be less controversial than reinstating parole or an amnesty, like the one proposed here. In designing a sustainable system of prison sentences, good time credits have an important role to play. First, unless made retroactive and large, in which case they would be just as controversial as an amnesty, an increase in good time credits would take years to reduce prison over-

⁵⁰ There are a growing number of columns and editorials calling on governors to do just that. *See, e.g.*, Michael Rinaldi, *To Reform State Government, Gov. Wolf Should Reform the Pardons System*, PENNLIVE (Jan. 26, 2015, 10:30 AM), http://www.pennlive.com/opinion/2015/01/post_38.html (noting that recent governors have rarely commuted the sentences of prisoners serving life sentences, where as governors in the 1970s did so frequently).

⁵¹ Larkin, *supra* note 25, at 7–8.

⁵² *Id.* at 9–10.

⁵³ *Id.* at 11.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

crowding and leave tens of thousands of prisoners experiencing degrading conditions during that period.⁵⁷ Secondly, prisoners who accumulate disciplinary reports generally do not receive good time credits or can lose the ones they have.⁵⁸ This means that prisoners who respond to degrading conditions by mentally decompensating, or developing a “bad attitude” toward staff, are at risk of not winning earlier release at all. In this latter respect, good time credits fit with the presumption of confidence in prosecutorial discretion, only with prison staff as prosecutors. Given the extremely hostile relationship between staff and prisoners developed under the regime of mass incarceration,⁵⁹ staff might resist the population reduction effects of a good time credit extension law by writing up more prisoners for more trivial disciplinary violations.

D. *Ideological Limits of Reform*

No doubt these pathways of reform, and others, such as decriminalization through substantive criminal law reforms, are essential to ending mass incarceration and producing a sustainable and more legitimate criminal justice system. The problem is that they are currently constricted by powerful presumptions that favor suspicions of people convicted of even low-level crimes, and in turn, trust in law enforcement—especially prosecutors—to discern who the real threats are and how long they need to be incapacitated for.⁶⁰ These presumptions operate much like an ideology in the sense that they are a structure of beliefs that operate below the level of conscious political or policy dialogue and help predetermine the limits of that dialogue.⁶¹

⁵⁷ See *id.* at 41.

⁵⁸ See *id.* at 11.

⁵⁹ See, e.g., Aviram, *supra* note 8, at 108.

⁶⁰ See SIMON, *supra* note 6, at 4.

⁶¹ Perhaps the most influential social theorist to develop ideology in this way was the mid-20th century Italian Marxist, Antonio Gramsci. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 3 (Quintin Hoare & Geoffrey Nowell Smith eds., trans., 11th prt. 1992); see also LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127, 145 (Ben Brewster trans., 1971).

At the current conjuncture, one in which the window for policy change is open to an unusual degree, we can see a number of restrictions that have narrowed the possibility for more substantial change toward ending mass incarceration. Perhaps the most important is violence. Since fear of violence, euphemistically referred to as “public safety,” is and has been the underlying source of legitimacy for mass incarceration,⁶² politically realistic sentencing reform must first be predicated on separating those convicted of non-violent crimes, whose status as exiled from the community through long-term incarceration is subject to possible review, and those convicted of violent crimes, whose status is not.⁶³ Second, in order to protect public safety, even those convicted of non-violent crimes should be subject to individualized review, preferably dominated by prosecutors. To overcome these systemic restraints and open the pathways of reform to broad, generous, and urgent reform initiatives, we need legal mechanisms that will metaphorically disrupt, loosen, shake off, and ultimately reduce the hold of these presumptions.⁶⁴

E. *Dress Rehearsal for Amnesty*

We have already had one fascinating and successful experiment with such a legal “bomb.” In *Brown v. Plata*,⁶⁵ the Supreme Court upheld the population cap imposed by a special three-judge federal court that was expected by both sides to result in tens of thousands

⁶² SIMON, *supra* note 6, 24–25 (describing fear of violence as crucial to the common sense that emerged in the 1970s and made mass incarceration a legitimate response).

⁶³ President Obama underscored this during his prison visit when he stated that his belief in giving prisoners a “second chance” did not extend to those convicted of violent crime. “‘There are people who need to be in prison, and I don’t have tolerance for violent criminals,’ Mr. Obama said. ‘Many of them may have made mistakes, but we need to keep our communities safe.’” See Peter Baker, *Obama, In Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html>.

⁶⁴ Neither of which is sensible for public policy in the 2010s and beyond quite independently of this author’s undisguised zeal for the goal of ending mass incarceration.

⁶⁵ 131 S. Ct. 1910, 1923 (2011).

of people being diverted from certain terms in California state prisons, to very uncertain and mostly partial sentences in local county jails. Justice Scalia, in his dissent, described the underlying injunction as “the most radical” in U.S. history⁶⁶ and Justice Alito, in his separate dissent, ominously predicted the murder of innocents would follow.⁶⁷ The result, as of 2013, was the largest prison population reduction in U.S. history and the most carefully monitored for signs of a crime wave.⁶⁸ Despite media desire to report on such a crime wave, the only substantiated increase in crime was in auto-thefts and burglaries.⁶⁹ While plenty of police chiefs are ready to blame this on Realignment, there has been no public backlash thus far.⁷⁰ Indeed, when the voters approved Proposition 47, they did so knowing that it would put some 2,000 additional prisoners back in the community.⁷¹ Together, these initiatives have allowed the state to meet its overcrowding target set by the *Plata* Court⁷² and, recently, to be given limited authority to run its own prison medical system at enormous cost savings to what it would have taken to build more prisons in order to meet the crisis.

Not only has *Plata* and Realignment not led to a crime wave or a backlash, it has also unleashed a revolution in criminal justice policymaking, where decisions, which were once made by politically competitive legislators and all powerful local prosecutors, are now

⁶⁶ *Id.* at 1950 (Scalia, J., dissenting).

⁶⁷ *Id.* at 1968 (Alito, J., dissenting).

⁶⁸ Christopher Horne & William J. Newman, *Updates Since Brown v. Plata: Alternative Solutions for Prison Overcrowding in California*, 43 J. ACAD. OF PSYCHIATRY & L. ONLINE 87, 88 (2015); Giana Magnoli, *Police Chief Says Realignment to Blame for Rise in Santa Barbara Crime*, NOOZHAWK (Jan. 9, 2013, 1:38 AM), http://www.noozhawk.com/article/010813_police_chief_realignment_rise_in_crime/.

⁶⁹ Magnus Lofstrom & Stephen Raphael, *Public Safety Realignment and Crime Rates in California*, PUB. POLICY INST. CAL., 1–2 (Dec. 2013), http://www.ppic.org/content/pubs/report/R_1213MLR.pdf (violent crime rose slightly as well, but comparisons with other states suggests this was part of a broader trend not related to prison releases in California).

⁷⁰ Magnoli, *supra* note 68.

⁷¹ See Editorials, *California's Prison-Population Reduction is Good News*, SAN FRANCISCO CHRONICLE (Feb. 1, 2015), <http://www.sfchronicle.com/opinion/editorials/article/California-s-prison-population-reduction-is-6052893.php>.

⁷² *Id.*

subject to a Community Correctional Council at which a wide variety of criminal justice policy makers have a seat.⁷³ While these councils are far from fully representative, they appear to be far more open to the voices of communities that experience high levels of incarceration and crime than either legislatures or prosecutors.⁷⁴

As noted above, future *Brown v. Plata*-like decisions are possible if states do not take their own steps to reduce overcrowding, but they will take years and they largely leave it to the states to decide how to respond. With state budgets recovering from the Great Recession, there is little guarantee that other states with chronic overcrowding will respond as California did in the midst of its deepest fiscal crisis in decades.⁷⁵ Instead, this article offers legal amnesty as an alternative or supplement in the form of general measures of sentence relief, whether legislative or executive, that produce *Plata*-like drops in state prison populations.⁷⁶ Amnesties of one-time sentence reductions aimed at reducing chronic overcrowding in a short, but orderly manner, will not substitute for the hard political work of enacting substantial sentencing reform and transforming law enforcement and prosecutorial routines. However, they could dramatically change the context in which that reform will take place, freeing those states to reinvent their model of criminal justice and saving both money and prisoner lives that would be lost to costly and inadequate medical care in prison settings.

II. JUBILEE: TEMPORALITY, SOVEREIGNTY, AND RESTORATION

And ye shall hallow the fiftieth year, and proclaim liberty throughout all the land unto all the inhabitants thereof: it shall be a jubile[e] unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family.

⁷³ Kathryn Jett & Joan Hancock, *Realignment in the Counties*, 25 FED. SENT'G REP. 236, 238 (2013).

⁷⁴ *Id.*

⁷⁵ AVIRAM, *supra* note 8, at 6; GOTTSCHALK, *supra* note 4, at 8–9.

⁷⁶ An enlightened legislature and or governor could meet a *Plata*-like legal challenge by raising overcrowding and medical care with an amnesty law designed to obviate the need for a judicial population cap.

Leviticus 25:10

The long legal tradition of amnesties takes its precedence from the religious tradition beginning in the Biblical requirement of a “jubilee,” or periodic forgiveness of all sorts of bonds (including penal ones). The structure of the Biblical injunction brings into play three crucial elements that have informed amnesty as a practice ever since. The first is time: fifty years. Amnesties are regular, but extraordinary. One might see only one in a lifetime, or live one’s whole life without seeing one. The second is sovereignty. Not only is the passage a command for God, it is a directive to those who hold power over others. Finally, it commands an act of restoration, which returns people to their possessions and their families, not on the basis of individual desert, but universally. Like much in the Bible, the account of the Jubilee is fragmentary and incomplete. What happens after the fiftieth year? Is it an end to servitudes, punishments, and debts, or only a furlough? Despite this, the idea and structure of a jubilee has remained a persistent one in the western political and religious tradition. Heads of church and state have regularly marked their reigns with amnesties pardoning sins, and in the case of monarch’s, actual crimes. There is something that works about this triad of marking time, conditioning the power of sovereigns, and building restoration into systems of otherwise unending oppression.

A. *The Ecclesiastical Tradition of Jubilee*

Jubilees have been declared by heads of the Roman Catholic Church since Pope Boniface reestablished the practice in 1300.⁷⁷ The declaration or Bull issued by Boniface offered a forgiveness of sins to those who visited the main Roman Basilicas during the coming year in honor of the closing of the century and the beginning of a new one.⁷⁸ According to religion scholar Jose Casanova, this was the first time a Christian “century” was acknowledged as an important unit of time.⁷⁹ By 1500, the practice was well established,

⁷⁷ Jose Casanova, *Religion, the New Millennium, and Globalization*, 62 SOC. RELIGION 415, 420 n.4 (2001).

⁷⁸ *Id.*

⁷⁹ *Id.*

typically occurring every 25 years, and survived even Luther's attack on the larger structure of "indulgences" or church forgiveness of sins.⁸⁰

In 2000, this tradition was revitalized by Pope John Paul II to mark the millennial year.⁸¹ The Pope chose to focus much of his public declaration of the jubilee on the plight of prisoners, calling on world leaders to honor the millennium by undertaking a mass release of prisoners; a call he repeated in his 2002 address to the Italian parliament.⁸² In a dramatic visit to one of Rome's overcrowded prisons, the Pope represented the potential benefits of a mass asylum as going beyond simply relieving the immediate suffering of overcrowding to shaping the proper context for undertaking the kind of reform of criminal justice necessary to prevent future overcrowding:

Jubilees have been an incentive for the community to reconsider human justice against the measure of God's justice. Only a calm appraisal of the functioning of penal institutions, a candid recognition of the goals society has in mind in confronting crime, and a serious assessment of the means adopted to attain these goals have led in the past and can still lead to identifying the corrections which need to be made.⁸³

While the papal tradition of jubilees may indeed seem a distant precedent for the context of modern legal amnesties, it is remarkable and relevant to our discussion that Pope John Paul II chose to focus his revitalization of this tradition on the most secular and legal subject of prisoners. Moreover, the Pope personally went to an overcrowded prison to bear witness to the conditions there, to personally embody a refusal to treat prisoners as belonging to a world apart, and to call on secular leaders to use their legal authority to relieve

⁸⁰ *Id.* at 421 n.4.

⁸¹ *Id.* at 421.

⁸² Cheryl Heckler, *Italy Moves to Relieve Overcrowding in its Jail Cells*, CHRISTIAN SCI. MONITOR (July 18, 2003), <http://www.csmonitor.com/2003/0718/p07s02-woeu.html>.

⁸³ Pope John Paul II, *The Celebration of the Great Jubilee: Message for the Jubilee in Prisons*, L'OSSERVATORE ROMANO WKLY. EDITION ENG. (July 5, 2000), <https://www.ewtn.com/library/PAPALDOC/jjp2pris.htm>.

the prisoners' suffering through a mass amnesty.⁸⁴ This combination of personal action to close the gap between prisons and society, to witness the reality of overcrowded prisons, and to call for mass measures of amnesty, provides a striking precedent with great relevance to secular leaders.⁸⁵

Speaking at the prison, Pope John Paul II made specific reference to the relationship between time, sovereignty, and restoration embedded in the original biblical injunction:

The Jubilee reminds us that *time belongs to God*. Even time in prison does not escape God's dominion. Public authorities who deprive human beings of their personal freedom as the law requires, bracketing off as it were a longer or shorter part of their life, must realize that *they are not masters of the prisoners' time*. In the same way, those who are in detention must not live as if their time in prison had been taken from them completely: *even time in prison is God's time*. As such it needs to be lived to the full; it is a time which needs to be offered to God as a[n] occasion of truth, humility, expiation and even faith. The Jubilee serves to remind us that not only does time belong to God, but that the moments in which we succeed in "restoring" all things in Christ become for us "a time of the Lord's favour".⁸⁶

Pope John Paul's call was eventually taken up by the Italian Parliament, which, in 2006, enacted a general pardon law that eliminated prison overcrowding (although sadly only temporarily).⁸⁷

⁸⁴ Heckler, *supra* note 82.

⁸⁵ It is perhaps not insignificant in this respect that President Obama recently visited a federal prison in Oklahoma, becoming the first sitting president to do so ever. While there, he pointedly commented on the fact that the 90 square foot cells had been fitted to hold three prisoners, a mark of chronic overcrowding in the federal system. While calling for new efforts at rehabilitation, reentry, and sentencing reform, the President stopped short of issuing his own amnesty call. See Baker, *supra* note 63.

⁸⁶ Pope John Paul II, *supra* note 83.

⁸⁷ Buonanno & Raphael, *infra* note 116, at 2441.

Pope Benedict⁸⁸ continued John Paul II's campaign to improve prison conditions. Perhaps even more interestingly, Pope Francis recently declared an "Extraordinary Jubilee Year" (i.e., one not following the traditional spans of 25), "a Holy Year of Mercy" which began December 8, 2015 and runs through November 20, 2016.⁸⁹ While Pope Francis did not mention prison overcrowding specifically in his message, he made it a point to visit a prison very early in his papacy; one on his own home continent of South America and known by inmates for wretched conditions and control.⁹⁰

B. *The Monarchical Tradition of Amnesty*

The Roman Church was a model for the states that eventually evolved out of medieval European society, so it is perhaps not surprising that amnesties became a regular ritual of European monarchy.⁹¹ New monarchs commonly marked their ascension to the throne by opening the prisons of the nation.⁹² To modern citizens, this practice likely seems perverse in every sense. How can a new leader promote the peace of the realm and the success of his or her reign by suspending the punishments imposed under the legal system of his or her predecessor who was commonly also his or her parent or close relative?⁹³ In the distinctive political logic of monarchy, with its roots in religious conceptions of the sovereign as the national "pope," or representative of the people to God, the begin-

⁸⁸ Philip Pullella, *Pope Visits Rome Jail, Decries Overcrowding*, REUTERS (Dec. 18, 2011, 11:31 AM), <http://www.reuters.com/article/2011/12/18/us-pope-prison-idUSTRE7BH0IS20111218> (Sadly, Italy had already cleared its overcrowding with the 2006 Amnesty and then built it up again).

⁸⁹ Ed West, *Pope Francis Announces Extraordinary Jubilee Year*, CATHOLIC HERALD (Mar. 13, 2015), <http://www.catholicherald.co.uk/news/2015/03/13/pope-announces-extraordinary-jubilee-year/>.

⁹⁰ *The Pope Visits Bolivia's Notorious Palmasola Prison*, NPR (July 11, 2015, 5:09 PM), <http://www.npr.org/2015/07/11/422114674/the-pope-visits-bolivia-s-notorious-palmasola-prison>.

⁹¹ See, e.g., John C. Palenberg, *Mass Amnesty: The East German Answer to Prison Overcrowding*, 11 AM. J. CRIM. L. 369, 370 (1983).

⁹² See, e.g., *id.*

⁹³ Of course, where a monarch has reached the throne after emptying it of a rival claimant, it may well be his or her own supporters who make up the great proportion of the prison population, and thus releasing them would make great sense.

ning of a new reign was a jubilee, a holy year which, like the Christian centuries, marked a divine presence in human life.⁹⁴ An amnesty of prisoners in honor of this jubilee portended not a crime wave, but a world made over in justice and therefore potentially crime free.⁹⁵

Alongside this theological and political logic, the more individual level politics of prisoner release may have also been in play. Today, asylum for prisoners is seen as a politically risky move for elected politicians.⁹⁶ Then, asylum would have been a populist gesture. In that world, without hyperventilating media coverage of crime (or anything else) and political valorization of crime victims, there were probably far more people positively touched by the sudden release of a son, brother, husband, or father, than there were aggrieved.

C. *Asylum in Modern European Governments*

One might have expected amnesties to die away with the emergence of modern regimes of government because of their legal, as opposed to traditional or charismatic, claims to legitimacy. Indeed, one might expect governments dependent on the force of the law to maintain the legitimacy of their rule to avoid gestures that seem to inherently question the obligatory nature of law. Yet in Europe, the practice continued with hardly any interruption.

1. GERMANY

Germany is a striking example. The Hohenzollern imperial regime that collapsed in 1918 had frequently declared amnesties for prisoners to mark royal ascensions and weddings,⁹⁷ but the Weimar republic that replaced it began a series of prisoner amnesties, originally premised on the need for labor after the terrible losses of manpower in the war.⁹⁸ However, as Weimar's increasingly violent street politics filled the prisons with partisans of the left and right, amnesties took on an increasingly political character.⁹⁹

⁹⁴ See Pope John Paul II, *supra* note 83.

⁹⁵ *Id.*; see also, e.g., Palenberg, *supra* note 91, at 370.

⁹⁶ See generally Simon, *supra* note 15.

⁹⁷ See Palenberg, *supra* note 91.

⁹⁸ *Id.*

⁹⁹ See *id.* at 371.

After World War II, both sides of the divided nation continued the practice.¹⁰⁰ First, in 1945, the Soviets who had occupied the eastern part of Germany, declared an amnesty for all crimes adjudicated by the Nazi state.¹⁰¹ The motive was both the need for able-bodied adults to labor in the devastated nation and the questionable nature of “crimes” defined and enforced by a regime now notorious for its crimes against humanity.¹⁰² In 1949, the West German government, under its first premier Konrad Adenauer, declared an amnesty aimed at the need for labor, and initially focused only on those convicted of crimes by the Nazi state.¹⁰³ Soon, however, under pressure from the political right, Adenauer extended the amnesty to include former Nazis themselves.

The East German approach to amnesty was even more protracted.¹⁰⁴ In 1950, the Soviets who still directly ruled the occupied East Germany closed their prison camps and released about 15,000 prisoners.¹⁰⁵ In 1951, the new East German government declared its own amnesty for about 20,000 prisoners.¹⁰⁶ This was repeated again in 1956, resulting in another 18,000 releases.¹⁰⁷ The most dramatic amnesty of all was in 1979, when the East German government, facing increasingly political and economic challenges, released 32,000 prisoners—over 70 percent of its prison population—in less than one month.¹⁰⁸

2. ITALY

Italy has a similar history to Germany with respect to amnesties and pardons. Between the unification of Italy in 1865 and the defeat of Fascist Italy in 1943, Italian governments issued some 200 amnesties; some quite general, others aimed at very specific crimes or

¹⁰⁰ See *id.* at 371–72.

¹⁰¹ *Id.*

¹⁰² See *id.* at 371.

¹⁰³ See Belinda Cooper, *Truth and Reconciliation*, N.Y. TIMES (Feb. 9, 2003), <http://www.nytimes.com/2003/02/09/books/truth-and-reconciliation.html>.

¹⁰⁴ See Palenberg, *supra* note 91, at 371.

¹⁰⁵ *Id.* at 372.

¹⁰⁶ *Id.* at 373.

¹⁰⁷ *Id.* at 374.

¹⁰⁸ *Id.* at 376–77.

groups of convicts.¹⁰⁹ The occasions for these pardons ranged from royal births and weddings to territorial conquests and peace treaties.¹¹⁰ The frequent use of pardons has continued in post-World War II Italy, with a dozen amnesties or general pardons since 1945.¹¹¹ Indeed, so normal is the act of amnesty that Article 79 of the 1945 Constitution is devoted to it.¹¹² The objective of these modern Italian pardons has shifted from a focus on reunifying the nation after a divisive and disastrous war to the contemporary concern with prison overcrowding.¹¹³ The first pardon to deal with overcrowding came in 1986, when rising crime rates in the early 1980s and a stable level of prison capacity led to the country's first modern experience with prison overcrowding.¹¹⁴ Sixteen years passed before the next general pardon in 2006; this one again focused on prison overcrowding.¹¹⁵

The 2006 pardon was the largest one ever, and came in response to Pope John Paul II's millennial call for amnesties to address prison overcrowding.¹¹⁶ Italian prisons at the time were operating at 130 percent of capacity, resulting in a drop of nearly 30 percent of the prison population in less than six months.¹¹⁷ Under the terms of the pardon, all persons convicted before May 2, 2006 had their sentence reduced by three years.¹¹⁸ Those convicted of a new crime with a

¹⁰⁹ Alessandro Barbarino & Giovanni Mastrobuoni, *The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons*, IZA 3, 8 (Feb. 2012), <http://ftp.iza.org/dp6360.pdf>.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 9.

¹¹² *Id.*

¹¹³ *Id.* In Italy, amnesties are distinguished from pardons on the basis that the former completely eliminates the crime and the sentence, while the latter eliminates only part of the sentence (and indeed, that part can be re-imposed in the event of a future crime).

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.* (Inbetween, Italy had amended its Constitution to require a higher super majority in order to enact a general pardon).

¹¹⁶ Paolo Buonanno & Steven Raphael, *Incarceration and Incapacitation: Evidence from the 2006 Italian Collective Pardon*, 103 AM. ECON. REV. 2437, 2441 (2013).

¹¹⁷ *Id.* at 2441–42.

¹¹⁸ *Id.* at 2441. The pardon excluded those convicted of organized crime, felony sex offenders, and those convicted of terrorism, kidnapping, or exploitation of prostitution as ineligible for early release. *Id.*

sentence of at least two years faced a sentence enhancement of any months reprieved during the pardon.¹¹⁹ Released prisoners received no services or supervision.¹²⁰

Crime effects have been the primary concern of the economists who have studied the Italian pardons.¹²¹ In fact, crime increased significantly in the years immediately following the pardon, although these were mostly property crimes.¹²² Moreover, while Italian pardons worked some very rapid reductions in prison overcrowding (up to 70 percent in some regions), the prison population has rebounded quickly, growing an average of 2,944 inmates in the year following a pardon, compared with 1,165 inmates.¹²³ To address long-term overcrowding, economists recommend building more prisons or increasing alternatives to incarceration rather than relying on pardons.¹²⁴

This modern European history seems to stand as a warning against reliance on amnesties to address problems of either demography or regime change. Once begun, amnesties seem to spread quickly beyond their initial targets and motives, and often incorporate those, like former Nazis, who clearly do not deserve them. In a situation like that of East Germany's, where amnesties are repeated within the same generation, it is reasonable to expect that the deterrence power of the criminal law, always questionable, will falter further as people anticipate that potential convictions will be wiped away in the next amnesty. More insidiously, such amnesties raise questions about whether these modern governments are truly based on the rule of law, as they claim, or only on political calculation.

¹¹⁹ *Id.*; Francesco Drago et al., *The Deterrent Effects of Prison: Evidence from a Natural Experiment*, 117 J. POL. ECON. 257, 258 (2009) (finding an increase in deterrence with the increasing number of months pardoned prisoner faced as additional enhancement and also stand little chance of a new pardon in the years immediately following a general pardon).

¹²⁰ Buonanno & Raphael, *supra* note 116, at 2441.

¹²¹ *See* Barbarino & Mastrobuoni, *supra* note 109, at 3.

¹²² *See id.* at 18, 53 (In the months after a pardon, crimes go up by 5.6%).

¹²³ *Id.* at 10. (This, however, excludes the 2006 general pardon, outcome data for which were not available for this paper).

¹²⁴ *See id.* at 32, 36 (suggesting that unless they can be made more selective, pardons generate higher crime costs on society than they save in incarceration costs).

3. THE UNITED STATES

The United States Constitution grants the President the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹²⁵ Courts have recognized few, if any, limitations on this power.¹²⁶ This power has many dimensions, including reprieves, or temporary delays of sentence, pardons, which are a complete removal of all legal aspects of a conviction (including punishment, but also the very fact of guilt), and commutations, which are reductions in the scope or severity of a sentence.¹²⁷ The pardon power also incorporates the idea of amnesty, which is for all essential purposes a grant of pardon or clemency to “a class of offenders instead of individually.”¹²⁸ While pardons have been common across American history until the last forty years, amnesties have always been special, usually coming only after a war.¹²⁹

While the President is granted independent authority to grant pardons and amnesties, Congress also has at times acted to facilitate the use of that power.¹³⁰ At the outbreak of the civil war, Congress enacted the Confiscation Act of 1862, stating that:

the President is hereby authorized, at anytime hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.¹³¹

¹²⁵ U.S. CONST. art. II, § 2; Barkow, *supra* note 10, at 8.

¹²⁶ Barkow, *supra* note 10, at 10–11.

¹²⁷ *Id.* at 9.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See, e.g., id.* at 12.

¹³¹ Confiscation Act, ch. 195, 2 Stat. 589, 592 (1862); Daniel W. Hamilton, *First and Second Confiscation Acts (1861, 1862)*, ENCYCLOPEDIA.COM (2004), <http://www.encyclopedia.com/doc/1G2-3407400130.html> (last visited Oct. 17, 2015).

President Lincoln followed that course a year later, offering an amnesty to all members of the rebellion who had not held Confederate office or mistreated Union prisoners.¹³² Interestingly, President Lincoln also issued a very different kind of mass pardon or amnesty in 1862 when he reprieved 254 of 303 Native Americans sentenced to death for an uprising in Nebraska.¹³³ After the war, President Andrew Johnson offered the defeated confederates even more generous amnesty terms.¹³⁴ President Truman issued four different amnesty measures addressing military or selective service offenses after World War II.¹³⁵ Additionally, Presidents Ford and Carter issued successfully broader amnesties for Vietnam-era offenses.¹³⁶

There is far less evidence of past use of mass amnesty in the United States outside of the context of war and military-related offenses. What action there was in mass pardons or amnesties took place at the state level, where until the late 20th century, the vast majority of all criminal prosecutions and imprisonment occurred.¹³⁷ Unlike the Constitution, which gives exclusive authority over pardoning to the President, some two thirds of the states give an administrative board authority to either make recommendations on pardons, or share the actual power to pardon with the governor.¹³⁸ Individual pardons were extremely common at the state level until the late 20th century, but mass pardons or amnesties have been rare.

One important precedent took place in 1823, when New York Governor Robert Yates pardoned scores of surviving prisoners after many others succumbed to insanity from being held in complete solitary confinement without the opportunity for labor during a several year-long experiment with different forms of solitary confinement

¹³² JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898, at 35 (1953); Larkin, *supra* note 25, at 7.

¹³³ JOHN J. MONTAG, RONALD C. NAUGLE & JAMES C. OLSON, HISTORY OF NEBRASKA 183 (4th ed. 2015).

¹³⁴ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1174 n.16 (2010).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See infra* notes 139, 140.

¹³⁸ Barkow, *supra* note 14, at 1350.

at Auburn prison.¹³⁹ In 2003, Illinois Governor George Ryan issued a mass clemency to all of the prisoners on Illinois' death row, some 167 prisoners, reducing their sentences from death to life imprisonment.¹⁴⁰ The Governor acted after conducting clemency hearings and following repeated scandals involving government misconduct leading to the wrongful conviction of prisoners sentenced to death.¹⁴¹

4. AMNESTY UNDER INTERNATIONAL HUMAN RIGHTS LAW

One of the most common but fraught situations in which contemporary governments consider granting broad amnesties is in situations of "transitional justice" where a new political order is being constituted after the collapse of a previous regime (such as a military dictatorship) or following a protracted militarized conflict, or both.¹⁴² International human rights law is particularly concerned with the extension of amnesties to members of the armed forces or of insurgent militias who have committed human rights violations against others.¹⁴³ Yet even in this distinct situation, amnesty is disfavored but not forbidden.¹⁴⁴ The United Nations does not endorse or support tribunals that grant amnesties dealing with "genocide, war crimes, crimes against humanity, and gross violations of human rights."¹⁴⁵ Amnesties in transitional justice situations, even when they exclude these major crimes, are considered highly problematic because they leave victims of human rights violations without justice and can lead to further conflict. Amnesties should be considered

¹³⁹ REBECCA MCCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941*, at 57 (2008).

¹⁴⁰ Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), <http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html>.

¹⁴¹ *Id.*

¹⁴² Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 50 VA. J. INTL. L. 915, 916 (2009).

¹⁴³ *Id.* at 917-18.

¹⁴⁴ *See id.*

¹⁴⁵ U.N. Secretary-General, *United Nations Approach to Transitional Justice*, 4 (Mar. 2010).

only when absolutely necessary to secure an agreement for demobilization, disarmament, and reintegration of conflict participants.¹⁴⁶ States in transitional justice contexts that do engage in amnesty are urged to do so in ways that retain as much accountability as possible.¹⁴⁷

III. AN AMNESTY APPROACH TO ENDING MASS INCARCERATION

This article has the limited ambition of putting amnesty into the conversation about how to end mass incarceration in the United States. Given the present state of the conversation, there will be plenty of time to lay out the details of federal and state amnesty measures, but this argument would be incomplete without a sketch of the basic features of the amnesty model I would advocate. One huge issue is scale. There is no current consensus on how low the incarceration rate in America should drop, or how much overcrowding is tolerable in a prison setting. If mass incarceration refers in part to the supersizing of the historically relatively consistent American incarceration rate of 100 per 100 thousand, then “ending mass incarceration” requires a radical reduction in our current level of around 400 per 100 thousand, to something less than half of the current rate.¹⁴⁸ Indeed, given that crime rates are now as low as they were in the early 1960s,¹⁴⁹ a case can be made for returning incarceration rates to the pre-1975 norm of 100 prisoners per 100 thousand people.

It is not my claim, however, that amnesty laws should be the primary engine of restoring balance to American incarceration, lest we end up like modern Italy or Germany with some half-dozen amnesties each in sixty years. That must be accomplished by sentencing reforms. The appropriate goal of amnesties instead should be to wipe out overcrowding and to undermine the structural power of the twin presumptions of the dangerousness of people convicted of crimes and confidence in prosecutorial discretion.

¹⁴⁶ Mark Freeman, *Amnesties and DDR Programs*, INT’L CTR. FOR TRANSITIONAL JUST., Feb. 2010 at 2.

¹⁴⁷ *See id.* at 3.

¹⁴⁸ CAUSES AND CONSEQUENCES, *supra* note 1, at 13.

¹⁴⁹ Zimring, *supra* note 2, at 1240–41.

I propose that the federal government and each state with prison populations above 100 percent of their design capacity should introduce a general amnesty applicable to all prison sentences by between 12 and 36 months, depending on the severity of overcrowding. This would mean that, as was the case in the Italian general amnesty law of 2006,¹⁵⁰ those currently serving sentences of less than the designated amnesty term of between 12 and 36 months would be released immediately. Others would be released as their remaining sentence term dipped beneath that amnesty term. As in the Italian case, the portion of the amnesty term actually used would be held over the beneficiary as a sentencing enhancement to any new term of at least one year of imprisonment.¹⁵¹

A. *Why Mass Incarceration Warrants an Amnesty Response*

As noted above, the United States has no tradition of using amnesties to manage its prison population (unlike Europe). Instead, amnesties have been limited in the United States to extreme aberrations of penal norms (like the Auburn, New York solitary confinement scheme) and to wartime expansions of criminal liability.¹⁵²

¹⁵⁰ The Italian law excluded mafia crimes because of the deep and continuing threat of mafia corruption of Italian government. See Alessandro Barbarino & Giovanni Mastrobuoni, *The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons*, 6 AM. ECON. J. ECON. POLICY 1, 9 (2014). There is no equivalent class of criminals that pose a serious threat to the integrity of American government today. America's own mafia is a pale shadow of what it was in the 1950s and was never the force it was in Italy. Politicians will no doubt want to limit the amnesty to "non-violent offenses." This would fatally limit the ability of amnesty laws to reduce incarceration substantially and it turns on a distinction that has little empirical basis or practical sense (despite having great common sense appeal). Since the inflation of prison sentences has taken place across the entire spectrum of crimes including drug, property, and crimes against the person, an amnesty offering relief should apply to all crimes. As with the Italian law, however, the amnesty should be limited to crimes committed at least three months before the commencement of the consideration of the law (to avoid a crime incentive during its debate) and for which at least six months of the sentence have been served (to avoid reducing the effective punishment for their crimes to zero).

¹⁵¹ Thus, those who had less than 12 to 35 months left to serve when the amnesty law took effect would face fewer months of enhancements.

¹⁵² See *infra* Part II.C.3.

While not perfect, the situation of mass incarceration fits with this limited role and justifies a unique departure from it.

1. MASS INCARCERATION IS AN ABERRATION OF AMERICAN PENAL NORMS

The very concept of mass incarceration, although not without controversy, arose from the recognition by scholars of punishment and society that U.S. imprisonment trends since the late 1970s had departed from historic norms.¹⁵³ This is true not only of the scale of imprisonment,¹⁵⁴ but even more importantly the allocation and practice of imprisonment. Historically, imprisonment in the United States was based on individualized consideration.¹⁵⁵ With the exception of the most serious felonies, few crimes attracted mandatory prison sentences.¹⁵⁶ The era of mass incarceration changed dramatically with the practice of routine imprisonment for minor felonies and parole violations and the adoption of mandatory sentencing schemes that required imposition of prolonged prison sentences, notwithstanding mitigating factual circumstances.¹⁵⁷ These sentencing laws and practices have in turn given prosecutors, who hold virtually unreviewable discretion to determine which specific charges

¹⁵³ See generally MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001).

¹⁵⁴ See FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT xi (1991).

¹⁵⁵ See CAUSES AND CONSEQUENCES, *supra* note 1, at 72 (“Because sentencing was to be individualized and judges had wide discretion, there were no standards for appellate judges to use in assessing a challenged sentence.”).

¹⁵⁶ See *id.* at 72–73 (“For the prison-bound, judges set maximum (and sometimes minimum) sentences, and parole boards decided whom to release and when . . . The second phase, from the mid-1980s through 1996, aimed primarily to make sentences for drug and violent crimes harsher and their imposition more certain. The principal mechanisms to those ends were mandatory minimum sentence, three strikes, truth-in-sentencing, and life without possibility of parole laws. Mandatory minimum sentence laws required minimum prison terms for people convicted of particular crimes.”)

¹⁵⁷ Perhaps the most infamous is the five-year minimum mandatory sentence for possession of five grams or more of “crack cocaine” under the federal law. That was reduced somewhat by Congress in 2010. See ALEXANDER, *supra* note 5, at 87; Editorial, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

to bring against a criminal defendant in the U.S., unprecedented power undermining the right to trial and the adversary system generally.¹⁵⁸

Mass incarceration has been responsible for an unprecedented concentration of imprisonment on minorities, particularly African Americans and Latinos.¹⁵⁹ With more African American men fated to spend time in prison than receiving higher education or joining the military, incarceration has become a normative experience in many communities leading to a spiral of social disorganization, concentrated poverty, and crime.¹⁶⁰ Disenfranchisement and other disabilities associated with having served a prison sentence in many states has undermined the meaning of citizenship and reversed the gains of the civil rights movement during the 20th century.¹⁶¹

Mass incarceration has led to chronic overcrowding across the nation, resulting in a historic devolution of standards of decency in American corrections.¹⁶² Prolonged exposure to cruel and degrading treatment, combined with an expanded prison population that includes a high proportion of people with chronic illnesses, constitutes “torture on the installment plan” for thousands of prisoners, in violation of the core commitments of the Eighth Amendment.¹⁶³ Of course, prisons in the United States have almost always lagged behind their progressive promises,¹⁶⁴ sometimes by overwhelming margins, but mass incarceration differs in reflecting a conscious state policy to expand the destructiveness of incarceration and to deliberately inflict it on members of historically stigmatized and discriminated-against social groups.¹⁶⁵

It is not that history lacks analogs for the systemic inhumanity and racialized violence of mass incarceration. The convict lease system, which essentially enslaved African Americans convicted of minor felonies in a patently unfair judicial process and operated from

¹⁵⁸ Stuntz, *supra* note 10, at 107.

¹⁵⁹ CAUSES AND CONSEQUENCES, *supra* note 1, at 13.

¹⁶⁰ TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 1, 5 (2007).

¹⁶¹ ALEXANDER, *supra* note 5, at 94.

¹⁶² SIMON, *supra* note 6, at 87–89.

¹⁶³ *Id.* at 4–5; *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

¹⁶⁴ See SIMON, *supra* note 6, at 6.

¹⁶⁵ See ALEXANDER, *supra* note 5, at 17.

the Reconstruction period (1870s) through the turn of the century, involved many of the same evils.¹⁶⁶ But even if mass incarceration lies a good deal closer to the norms of a legitimate and constitutional correctional system than the convict lease system, it still lies clearly on the side of the aberrational and is in need of systematic and deep remedies, including amnesty. A closer analogy than the convict lease system may be New York's use of solitary confinement without labor or education at the dawn of the penitentiary era in the 1820s.¹⁶⁷ As noted above, after the practice was denounced as deeply injurious to prisoners, Governor Yates pardoned the surviving prisoners.¹⁶⁸

2. DEFORMATION OF THE PROSECUTORIAL FUNCTION

The U.S. criminal justice system places extraordinary discretion in the hands of prosecutors.¹⁶⁹ They are not obliged, as under some legal systems, to charge all crimes for which the evidence meets the legal definitions, which would allow courts to exercise the discretion.¹⁷⁰ Instead, at the state level, prosecutors have nearly unreviewable discretion to decide which charges to bring against which defendants.¹⁷¹ At the federal level, the Attorney General has formal authority and, since the 1970s, many Attorney Generals have issued directives guiding that give discretion to United States Attorneys, who are appointed by the President to prosecute crimes on behalf of the United States in each of the federal judicial districts.¹⁷² In the past, various political and professional forces operated to prevent prosecutorial discretion from becoming a dangerous power to oppress or persecute.¹⁷³ But the political and legal transformations that created mass incarceration insulated the prosecution from those

¹⁶⁶ ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* xiv–xv (1996).

¹⁶⁷ See *supra* Part II.C.3.

¹⁶⁸ *Id.*; MCCLENNAN, *supra* note 139, at 57.

¹⁶⁹ Fairfax, *supra* note 19, at 1247 (stating that a prosecutor can decline to prosecute for any reason, or for no reason at all).

¹⁷⁰ Barkow, *supra* note 10, at 32–33.

¹⁷¹ *Id.* at 31.

¹⁷² *Id.* at 32.

¹⁷³ See SIMON, *supra* note 15, at 33.

sources of restraint, and indeed greatly expanded the range of punitive severity available for prosecutors.¹⁷⁴ One of the leading scholars of modern American criminal justice, the late William Stuntz, showed how a politically reinforcing cycle of legislators enacting harsher laws, combined with prosecutors using that expanded power to erode judicial restraints, has produced nothing short of a “collapse” of the American system of criminal justice.¹⁷⁵

3. WAR ON CRIME

The strongest pattern in the American use of amnesty has been its association with wartime criminal offenses. After virtually every major war, there have been appeals for amnesties for citizens who committed criminal offenses against the military effort—typically draft resisters and deserters.¹⁷⁶ The most recent and famous followed the Vietnam War, America’s longest war until Afghanistan and one that generated unusual political controversy domestically.¹⁷⁷ The “war on crime” announced by American presidents of both parties in the 1960s and reaffirmed repeatedly by presidents until perhaps President Obama, while different in many respects from our military conflicts abroad, operated in many ways like a real war: mobilizing enormous governmental outlays, massively expanding the scale and lethal capacity of law enforcement, and concentrating that coercive power on territories within our urban cores, marked by race, language, and the perception (especially on the part of law enforcement) of dangerousness.¹⁷⁸ This war, our longest by far, severely compromised the legitimacy and self-repairing capacity of our criminal justice system.¹⁷⁹

The analogy with respect to amnesty is, in fact, imperfect in many respects. Peacetime amnesties are made to prisoners or prospective prisoners who would have committed no crime at all but

¹⁷⁴ See *id.* at 36.

¹⁷⁵ Stuntz, *supra* note 10, at 260.

¹⁷⁶ See Love, *supra* note 134, at 1173–74.

¹⁷⁷ See *id.* at 1174; see generally Greenawalt, *supra* note 23.

¹⁷⁸ See discussion on the “presumption of dangerousness” in the Introduction of this article.

¹⁷⁹ See SIMON, *supra* note 15, at 6.

for the previous state of war, which exposed them to legal obligations that do not normally apply in civil society.¹⁸⁰ Many of the beneficiaries of these amnesties did, in fact, serve the war cause to some extent before they deviated from their duties, and thus may well be seen as deserving of some gratitude expressed as mercy.¹⁸¹ Perhaps most importantly, few beneficiaries of peacetime military offense amnesties were likely to be seen as a threat to the public safety of the communities to which they returned.¹⁸² In contrast, prisoners are much more likely to be viewed as undeserving of mercy and a threat to public safety.¹⁸³

But precisely because mass incarceration represents such a departure from American legal and correctional practice, the analogy turns out to be less imperfect, and more meaningful, than might first appear. The enormous expansion of imprisonment means that many people now serving sentences would not have gone to prison at all, or would have already been released by now under shorter sentences. Their offenses may have pre-existed the war on crime, but not the stigma enhancing the fact of imprisonment.

For the same reason, the beneficiaries of a new amnesty aimed at ending prison overcrowding may carry less burden of public retributive emotions than would be the case of an amnesty in more normal correctional times. Indeed, while not subjects deserving of gratitude, prisoners in the era of chronic overcrowding may be perceived as deserving mercy precisely because the system failed to protect them from cruel and degrading treatment, or even torture. Finally, while there is little doubt that an actual amnesty law would be greeted with much concern about public safety, the broad consensus today that we are over-incarcerating, the overall evidence of historically modest and stable levels of crime today, and the further crime-risk-reducing potential of services and supervision that could

¹⁸⁰ See, e.g., Greenawalt, *supra* note 23, at 22–24.

¹⁸¹ See, e.g., *id.*

¹⁸² See, e.g., *id.* at 23.

¹⁸³ See SIMON, *supra* note 6, at 3–4 (describing this “common sense” and its historical origins).

be built into and accompany the beneficiaries of an amnesty, suggests the danger to public safety of a broad amnesty would be modest.¹⁸⁴

B. *The Potential Benefits of an Amnesty Approach*

Above, I've argued that this is an appropriate time in American history to overcome our normally justifiable antipathy to general criminal amnesties. Mass incarceration is such a significant aberration from our traditions and values that an amnesty now would pose little danger of becoming a regular or highly politicized feature of our criminal justice system (neither of which would be desirable, and both of which would be a potential disaster of its own). Here, I want to emphasize the significant benefits of an amnesty law, not just to its direct beneficiaries, but also to the broader community.

1. ENDING PRISON OVERCROWDING AND DEGRADING TREATMENT

The chronic overcrowding in many state and federal prisons that puts prisoners in danger of degrading treatment also endangers communities.¹⁸⁵ A substantial body of empirical evidence now shows that when people experience respect for their human dignity from authorities, their motivation to obey the law goes up, but when they feel that their dignity is disrespected, it goes down.¹⁸⁶ Chronic overcrowding, with its resulting lockdowns, failures to deliver needed medical care, and inability to support family visits and other positive ways to occupy time, inevitably results in a perception that authorities disrespect the human dignity of prisoners and can be expected

¹⁸⁴ As noted above, many concerns that California's Correctional Realignment would lead to violent crime spikes have not materialized at all.

¹⁸⁵ See *Federal Prison Overcrowding Endangering Staff, Inmates, Report Says*, FEDERAL SOUP (Sept. 25, 2012), <https://federalsoup.com/Articles/2012/09/25/Federal-prison-overcrowding-endangering-staff-and-in-mates.aspx>.

¹⁸⁶ 5 TOM R. TYLER AND YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS xiv (2002); VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 106–08 (2011).

to diminish the motivation of prisoners exposed to degrading treatment to obey the law in the future.¹⁸⁷ Little wonder that contemporary recidivism rates are so historically high.¹⁸⁸

2. PROCEDURAL JUSTICE

Not only would amnesty reduce the negative effect of degrading treatment on prisoners, it would itself constitute a large and concentrated dose of procedural justice.¹⁸⁹ For prisoners who may have only experienced the state and its actors in procedures aimed at punishing and harming them, the very process of being released early, having disabilities lifted, and being reintegrated into their communities could produce a powerful motivational force for change. The same is true for the children and relatives of returning prisoners, who will likely experience a positive effect of law that may improve the legitimacy of the legal system in their eyes and raise their motivation to comply with it.

3. DE-BULKING MASS INCARCERATION AHEAD OF SENTENCING REFORM

Perhaps the biggest caution that emerges from an examination of European amnesty practice¹⁹⁰ is that hopes for reforming the criminal justice system may rise and fall with the actual amnesty, producing no lasting structural changes and inevitably a resumption of overcrowding.¹⁹¹ In order to avoid that, sentencing reform has to be part of the goal. Amnesty should be seen not as an alternative to sentencing reform or as a way to delay it, but instead as a supplement designed to reduce the powerful presumptions in favor of law enforcement and against the criminalized, which if left in place are likely to dramatically reduce the scope of any successful reforms. Given the current scale of the system, and the powerful resistance to a significant downsizing of the scale that will inevitably be mounted by those whose power or economic interests are currently tied up with the system, there is a grave danger that a small reduction in

¹⁸⁷ See SIMON, *supra* note 6, at 6–7.

¹⁸⁸ CAUSES AND CONSEQUENCES, *supra* note 1, at 151.

¹⁸⁹ See TYLER & HUO, *supra* note 186, at 51.

¹⁹⁰ See *supra* Part II.C.

¹⁹¹ Barbarino & Mastrobuoni, *supra* note 109, at 10.

overall incarceration will be accepted as enough and mass incarceration will be declared officially over.

It is in this respect that amnesty can be a powerful prelude to a period of sentencing reform. By radically altering the current scale of the system, even before the political trade-offs, or “log-rolling” inevitable in a sentencing reform process begins, there is a greater chance that the new sentencing structures will aim at stabilizing the system at a much reduced scale of incarceration. As a highly visible repudiation of the punishment decisions made by prosecutors, amnesty will also deal a direct political blow to the organized prosecutorial lobby, which currently has great power at the state and federal level of law making.¹⁹²

4. CREATING A LEGAL RENUNCIATION OF MASS INCARCERATION

Paradoxically, the very rarity of ordinary criminal amnesties in American history could serve to help mark mass incarceration as an aberration in American correctional history, like the convict lease system or the solitary confinement system of the early 19th century—not to be repeated. The fact that solitary confinement has returned is a reminder that public memory, and not just professional consensus, is essential to keeping bad practices down.¹⁹³ Elsewhere, I have argued that states that engaged in mass incarceration should amend their constitutions to officially repudiate it.¹⁹⁴ But amending constitutions is very difficult to do, typically requiring a super majority of 2/3 of lawmakers, or of citizens where they are allowed to

¹⁹² LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 89 (2008) (empirically showing the power of prosecutors and law enforcement over policymaking at the state and federal level).

¹⁹³ The rebirth of prolonged solitary confinement as punishment, returning in the 1990s, more than a century after the Supreme Court had noted its aberrational status, shows that professional values are not enough to assure that a practice is not reinvented. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (discussing the serious threat of solitary confinement and the history of its reputation).

¹⁹⁴ SIMON, *supra* note 6, at 169–70 (adding the broad language common in modern human rights treaties protecting people not just against “cruel and unusual punishments” but any “cruel, inhuman, or degrading treatment or punishment” as a way of signaling a formal repudiation of mass incarceration and an instruction to future law makers and courts to avoid it).

amend the constitution by ballot.¹⁹⁵ Amnesty, which could be achieved in the majority of states by executive action or everywhere by a simple legislative majority supported by the governor, would serve much the same signaling function as a constitutional amendment. While it would lack the enduring influence on judicial enforcement of rights, amnesties would also have an immediate effect on prisons and prison conditions that constitutional amendments could only impact over a prolonged time.

C. *Costs of an Amnesty*

Naturally, any action that terminates or shortens so many legally adequate sentences raises serious worries about the impact on public safety and on respect for law. I already addressed why mass incarceration should cause us to be less worried about this, but I will address the criticisms head on.

1. DETERRENCE

How much the threat of imprisonment, if convicted of a crime, can deter people is a subject of some controversy.¹⁹⁶ An amnesty might undermine whatever deterrent threat there is by raising the prospect of early release. But, however much the prospect of an amnesty undermines deterrence, economists who have studied actual amnesties believe that they probably enhance deterrence on the grounds that once an amnesty is put into effect, the prospect of another one is considerably lessened for the near term.¹⁹⁷ Should amnesties become a regular recurring phenomenon every few years, as they were in Germany during the Weimar period, deterrence might be undermined.¹⁹⁸ Italy reformed its laws to require a 2/3 vote of the parliament to declare an amnesty; a shift that greatly reduced their

¹⁹⁵ See *Amending State Constitutions*, BALLOTPEDIA, http://ballotpedia.org/Amending_state_constitutions (last visited Oct. 22, 2015).

¹⁹⁶ David S. Lee & Justin McCrary, *Crime, Punishment, and Myopia* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 11491, 2005), <http://www.nber.org/papers/w11491>.

¹⁹⁷ Indeed, these economists attempt to exploit this dynamic to isolate the incapacitation effect of imprisonment on the theory that any post-amnesty increase in crime must be due to incapacitative effects because deterrence is actually stronger. Drago et al., *supra* note 119, at 260; Buonanno & Raphael, *supra* note 116, at 2438.

¹⁹⁸ See *supra* Part II.C.1.

frequency.¹⁹⁹ Given the extreme rarity of non-military amnesties in the U.S.,²⁰⁰ an amnesty targeted at reducing the prison overcrowding caused by mass incarceration is unlikely to be repeated.

An amnesty or general pardon may actually be the best way to optimize deterrence and reduce recidivism. Economists studying the Italian amnesty found that the enhancement in sentences for future crimes faced by prisoners benefitting from amnesty reduced the recidivism rates of those facing the longest enhancement.²⁰¹ Research on incarceration and recidivism has shown that longer times spent incarcerated are associated with high recidivism rates.²⁰² By reducing the incarceration effect and increasing deterrence, amnesty may be a powerful tool to reduce crime. The primary economic rebuttal is that these positive effects are overwhelmed by the reduction in incapacitation produced by releasing a large number of people with a propensity to commit future crimes who would otherwise have been outside of the community.

2. INCAPACITATION

Because people in prison have a proven past propensity to commit crimes, it is reasonable to expect an amnesty to increase the number of people free in the community with a propensity to commit crime through a reduction in the incapacitation effect of imprisonment.²⁰³ Crime did rise after Italy's 2006 amnesty, particularly thefts,²⁰⁴ and 22 percent of the amnestied prisoners were convicted of a new crime despite the deterrent effects noted above.²⁰⁵

But while a U.S. amnesty may also lead to some additional crimes, there is reason to believe it will be a modest increase. First, California's Correctional Realignment has been carefully studied during its first years, and a modest increase in crime, especially property crimes like auto thefts, has been detected.²⁰⁶ This may be

¹⁹⁹ See *supra* note 116.

²⁰⁰ See *supra* Part II.C.3.

²⁰¹ Drago et al., *supra* note 119, at 259.

²⁰² *Id.*

²⁰³ Buonanno & Raphael, *supra* note 116, at 2443.

²⁰⁴ *Id.* at 2449.

²⁰⁵ Drago et al., *supra* note 119, at 274.

²⁰⁶ Lofstrom & Raphael, *supra* note 69, at 4–5.

because California, and the U.S. generally, has been enjoying historically low levels of crime—patterns that include former prisoners.²⁰⁷ While incapacitation theory posits that propensity to commit crimes is a variable intrinsic to the individual, other criminologists believe that criminal behavior by former prisoners is subject to many of the same situational factors that seem to have reduced crime generally.²⁰⁸

Moreover, Italy released prisoners in the 2006 amnesty without providing any support or supervision for these former prisoners.²⁰⁹ Amnesty laws in the U.S. can and should be designed to assure that released prisoners are provided services and supervision through parole or probation agencies. As in California's realignment, additional funds should be provided to these agencies to take on the additional burden.²¹⁰ While a large portion of the Italian releases took place within the first month,²¹¹ an amnesty law should be designed to stagger releases so as to avoid overwhelming supervision agencies.

3. UNDERMINING RESPECT FOR THE RULE OF LAW

An amnesty is undeniably a suspension of a certain portion of the law as it stands at the moment just before the amnesty. It cannot help then but deal a blow to the rule of law.²¹² When amnesties are repeated frequently, that risk becomes a near certainty. This suggests, however, not that societies with respect for the rule of law never engage in amnesty, but that they do so only under three conditions. First, when a crisis has emerged in some sector of the state or civil society, which renders continued adherence to the existing rules pointless and destructive. Second, when forces that support an amnesty do so as part of a concerted political effort to rework the institutions that have led to the present crisis. And third, when the amnesty itself is carried out as much as possible in conformity with

²⁰⁷ CAUSES AND CONSEQUENCES, *supra* note 1, at 45–7.

²⁰⁸ FRANKLIN ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 164–65 (2012).

²⁰⁹ Buonanno & Raphael, *supra* note 116, at 2441.

²¹⁰ Jett & Hancock, *supra* note 73, at 237.

²¹¹ Buonanno & Raphael, *supra* note 116, at 2441.

²¹² Freeman, *supra* note 146, at 2 (“[A]mnesties may run the risk of damaging public confidence in the rule of law.”).

the spirit of the rule of law.²¹³ The present crises in criminal justice and crimmigration meet the first of these requirements. President Obama's order suspending deportation for certain categories²¹⁴ meets the second and third requirements, and so would properly implemented criminal amnesties to end overcrowding in the federal and state prison systems.

Crises, whether brought about purely by governmental policies, like mass incarceration or crimmigration, or created through a combination of policies and private economic practices, like the global financial crisis that broke out in 2008,²¹⁵ often have the result of turning the previous system of legal rules into a cage, trapping tens of thousands of ordinary people and rendering it impossible for them to return to social or economic viability. Think of the national housing market seized by collapsing prices and an unwillingness of creditors to lend.²¹⁶ Insisting on keeping the cage locked in the name of the rule of law is the purest kind of triumph of formalism. Bailouts (in the financial world) and amnesties in the penal or crimmigration realms represent law-based mechanisms for restoring the ability of individuals and whole communities to resume their lives in accordance with the law.²¹⁷ Often, the only alternative is to leave those individuals and whole communities to lives outside of the law—a prospect that could hardly be considered good for the rule of law.

Mass incarceration is as powerful an example of this sort of crisis as we have in contemporary times.²¹⁸ While the offense definitions and sentencing provisions that have resulted in chronic overcrowding may mostly conform to the rule of law in a procedural sense, they have operated in a manner increasingly incompatible

²¹³ *Id.* at 3 (“It can be argued that the content of an amnesty should be evaluated on the basis of the degree to which it promises to: (1) fulfill a state’s core justice obligations in regard to human rights crimes; and (2) impair each of those obligations as little as possible.”).

²¹⁴ Jim Acosta & Stephen Collinson, *Obama: ‘You Can Come Out of the Shadows’*, CNN (Nov. 21, 2014), <http://www.cnn.com/2014/11/20/politics/obama-immigration-speech/>.

²¹⁵ Jonathan Simon, *Clearing the “Troubled Assets” of America’s Punishment Bubble*, 139 DAEDALUS 91, 92 (2010).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ I’ve argued elsewhere that we might productively compare it to the financial crisis in the housing market. *See id.* at 91.

with both the substantive and procedural aspects of justice. Most importantly, continued fealty to those particular sentences is subjecting fellow citizens to the continued risk of torture, inhumane, and degrading conditions in prison, in violation of the higher law of the Constitution.

Of course, there is no guarantee that states enacting an amnesty to end prison overcrowding will follow up with sentencing reform, just as there is no guarantee that the Obama administration will be able to follow up its temporary order with a comprehensive immigration reform, but such states offer reasonable and promising chances to alter the climate and context which has stymied structural reforms up to now.

Amnesty also looks to be a less serious challenge to the rule of law than the other key feature built into our legal tradition for responding to instances of legal but overly harsh punishment—jury nullification.²¹⁹ The latter is an ex-ante opportunity for a jury of ordinary citizens to avoid the punishment by finding the defendant “not guilty” despite evidence that establishes beyond a reasonable doubt the elements of the crime.²²⁰ Both have been viewed with much disfavor.²²¹ Yet, America’s experience with harsh punishment and mass incarceration is causing a much-needed reconsideration of both.

Professor Paul Butler has called for something like “mass jury nullification” by urging jurors to decline to convict people charged with non-violent drug crimes who face harsh punishments.²²² While both have their problems and virtues, amnesty offers a better vehicle for accomplishing steep reductions in punishment with less damage

²¹⁹ Barkow, *supra* note 14, at 1334.

²²⁰ *Id.* at 1340.

²²¹ *Id.* at 1335 (suggesting that the rise of the administrative state and the central role given courts to review regulatory actions is responsible for casting acts of discretionary mercy into suspicion). On jury nullification, see Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 307 (1996); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150–51 (1997). On executive clemency, see Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453–73 (2004); Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 124 (2000–2001).

²²² Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 679 (1995).

to the integrity of the legal system. Jury nullification, even if justifiable as a form of resistance to mass incarceration, is unlikely to become common enough to reduce incarceration rates significantly,²²³ nor would it do anything for those suffering from being incarcerated now under degrading conditions of overcrowding. Furthermore, while jury nullification tends to be invisible or have low visibility, and is rarely subject to public debate,²²⁴ an amnesty would be extremely visible and the executives who had the courage to implement it would surely have the legitimacy of the amnesty challenged in the very next election.

Bringing amnesty as close as possible to the rule of law means that the amnesties themselves must be principled and procedurally fair,²²⁵ and the implementation process must seriously strive to minimize any harms the amnesty may bring. Thus, a bad example of implementation was the Italian general pardon of 2006, which took place without any effort by the Italian state to aid provinces in which particularly high numbers of prisoners would be returning without services or supervision.²²⁶

CONCLUSION: AMNESTY AND CIVILIZATION

Amnesties have long played a role in managing the prison populations of advanced legal systems in Europe.²²⁷ In the United States, they have generally been limited to clearing the system of prisoners and cases involving war-related violations after the war has been completed.²²⁸ Mass incarceration, and the chronic over-

²²³ See Barkow, *supra* note 14, at 1334.

²²⁴ *Id.* at 1340.

²²⁵ International law recognizes the “good faith” of government actors in seeking to resolve a crisis. Freeman, *supra* note 146, at 3 (“‘Good faith’ is a core principle of international law. Where it is present, in the sense of a good faith effort to come to terms with a past conflict, the legitimacy of any amnesty . . . necessarily increases. Conversely, where it is absent, the prospect of legitimacy necessarily decreases.”). In the domestic context, the “good faith” with which an amnesty or a mass deferral of deportation is implemented matters as well.

²²⁶ Buonanno & Raphael, *supra* note 116, at 2441.

²²⁷ See *supra* Part II.C.

²²⁸ See *supra* Part II.C.3.

crowding it has led to, present a compelling occasion for an exception to this American tradition. Limited by the powerful presumptions of the dangerousness of the prison population and of confidence in prosecutorial discretion, conventional means like individual pardons or clemency, parole, or good time credit extensions simply cannot clear the backlog or put the nation in a strong position to structurally reform its sentencing laws. Only amnesties can reduce the prison populations rapidly enough to end the degrading conditions caused by overcrowding and diminish the powerful penal ideology that prevents substantial reform.

While amnesties may seem an outrageous departure from the rule of law, it is truly that status quo that constitutes the outrage. All approaches designed to be cautious methods of reducing prison overcrowding presume that the existing state of affairs is a legally tolerable state of affairs; but it is not. *Plata* contained a clear message that it is not tolerable to give states time to address overcrowding and medical and mental health problems at a pace affordable and desirable to the state. As Justice Kennedy wrote in *Brown v. Plata*: “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”²²⁹ The choice is now between amnesty and barbarism.

²²⁹ *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).